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In the Supreme Court of the United States

October Term
1981

No. 82-145

JAMES MARTIN SMITH,

Petitioner

vs.

DOUGLAS GONZALES, et al.

Respondent

OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner respectfully requests that this Court refuse petitioner's request for Writ of Certiorari, seeking review of the opinion of the Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

This entire action arises out of and revolves around a criminal investigation made by the defendant, Thomas P. Lane, of the East Baton Rouge Sheriff's Office concerning James Martin Smith, petitioner.

The incident took place in the area of East Baton Rouge Parish known as Central. This is a small, rural setting located approximately fourteen miles from the City of Baton Rouge. There is a Sheriff's substation there which provides the police protection for the area.

On May 27, 1977, Sgt. Lane was dispatched to the home of a Mr. & Mrs. McDowell. Upon arrival there, he found several other policemen, the appellant in this case, the McDowell family and Shirley Smith, the daughter of appellant. An altercation had developed between Mr. Smith and the McDowells involving threats and firearms. Sgt. Lane was directed to take over responsibility for the investigation and proceeded to do so.

Having determined that it was a family matter, Sgt. Lane returned Mr. Smith's pistol to him, talked briefly with the McDowells and was told by Mrs. McDowell, the mother of Shirley Smith's fiance, Steve McDowell, that the relationship between Shirley and her father was "not normal".

During the course of his conversations with Mr. Smith, Sgt. Lane had received a bank book belonging to Shirley. Thereafter, on the same day, Mr. Smith contacted Sgt. Lane with reference to filing charges against the McDowells and Sgt. Lane told him that he

could not handle the matter until Tuesday, hoping that tempers would have cooled. The Monday following the altercation was a holiday. Mr. Smith was not satisfied with this, and went to the East Baton Rouge Parish District Attorney's office and was referred to Chief Reeves, the chief criminal deputy of the East Baton Rouge Parish Sheriff's Office, but no charges were filed at that time against the McDowells.

On Saturday, Shirley came to the substation to pick up her belongings. Sgt. Lane questioned her and based on a hunch fostered by the earlier problem and Mrs. McDowell's statement, asked her about the possibility of incest and explained to her that it was against the law and that her father could be prosecuted if she desired it, if he was guilty of the crime. At first Shirley denied this, but later admitted that she had had incestuous relations with her father for approximately three years. At the time of her admission of these facts she was fifteen.

Shirley, at Sgt. Lane's direction, told her mother of this. Shirley's mother and father were estranged. Shirley's mother discussed this with Sgt. Lane and was told that they could seek assistance from the coroner's office if they were afraid of Mr. Smith based on his actions.

Thereafter, Shirley's mother went to the coroner's office with one of her relatives. She discussed the matter with the coroner, was interviewed by the coroner who, using his own independent judgment, without conversation with Sgt. Lane, issued a commitment order for observation of Mr. Smith. Sgt. Lane being the officer on duty at the time the commitment was issued

received notice from the coroner's office to pick up Mr. Smith and did so.

On Tuesday, Shirley came back to the substation and went to the District Attorney's office downtown with Sgt. Lane. At that time, she was examined by the coroner at the District Attorney's request and following that, the Assistant District Attorney who inteviewed her, Michael Ponder, based on his questioning of Shirley and his belief in her veracity, issued a warrant for the arrest of Mr. Smith for incest.

After Mr. Smith was placed in jail on this charge and after Sgt. Lane had left the jail, one of the jailers called Sgt. Lane's superior, Chief Reeves, and advised him that Smith was making serious death threats against Lane. Chief Reeves then advised Sgt. Lane to notify Judge Gonzales, who was setting the bond, of these threats, at which time, Judge Gonzales, who has absolute discretion in these matters, raised the bond to $250,000.

Thereafter, Mr. Smith requested and received a preliminary hearing. At the preliminary hearing, Judge Gonzales found probable cause to hold him for trial. When the transcript was made of that testimony, it was discovered that the recording device had failed and therefore a second preliminary hearing was held before Judge Donovan Parker. At that time, Judge Parker found probable cause to hold Mr. Smith for trial. Shirley testified at each of these hearings. Thereafter, at the request of Mr. Smith, a Grand Jury was convened and Mr. Smith was allowed to present evidence before the Grand Jury. Shirley Smith also testified before the

Grand Jury and the Grand Jury found probable cause to hold Mr. Smith for trial. Thereafter, at the request of Mr. Smith, a lie detector test or polygraph was given to Shirley. Shirley passed the polygraph test.

Ultimately, trial was held before Judge Donovan W. Parker, and Mr. Smith was acquitted of the charge. He brings the resulting lawsuit, the trial was had before the Honorable Frank Polozola, U.S. Judge for the United States District Court for the Middle District of Louisiana before a jury, and after trial of the cause, the jury in fifteen minutes returned a verdict in favor of Sgt. Lane.

The appeal was prosecuted to the Fifth Circuit, who also denied petitioner's complaints.

REASONS FOR DENYING THE WRIT

Appellant states in his questions presented the following for number one:

> "1. Whether a police officer who acts maliciously, withholds relevant information, and misleads a prosecuting attorney in order to obtain a facially valid arrest warrant deserves absolute immunity from liability under 42 U.S.C. Section 1983 when he induces others to pursue prosecution."

The simplest and shortest answer to this particular question would be that there was no malice, no withholding of any relevant information and no misleading of a prosecuting attorney. Discussion will be had as to each of these points.

The malice alleged by petitioner is "proved" by Deputy Lane's actions, which consisted of going to the scene of an altercation, interviewing the people in-

volved (none of whom he knew before the incident) and following up on information given to him during the interviews. Mrs. Faye McDowell, Steve's mother, told respondent during the course of the interview that Shirley and Mr. Smith's relationship was not anormal father-daughter relationship. The day after the altercation, Shirley went to the police substation to pick up some personal belongings. Because of the information given to respondent by Mrs. McDowell, Deputy Lane asked Shirley if she wanted to talked. During their conversation, Lane asked Shirley about her relationship with her father. At first she denied there was anything wrong, but when Lane informed her that a father's sexual advance toward his daughter were unlawful and that she could take legal action to stop them, she voluntarily told Lane of the incestuous relationship. She was never threatened with prosecution for incest, she was simply informed that you (meaning anyone) could be prosecuted for incest. On page 112 of Vol I of the testimony in the United States District Court, Middle District, lines 21 to 25 she testified:

> "He (Lane) told me that incest was against the law; that there was a penalty for it; and he told me if I wanted to, I could press charges; if not, I didn't have to. But I decided to press charges. And, if I would have know a lot sooner, he (Smith) would have been arrested a lot sooner."

As part of petitioner's initial claim of malice, he alleged that Deputy Lane, in advising Mrs. Smith of her right to go to the coroner, was being malicious toward him, however, testimony at the trial indicated that Mrs. Smith went to the coroner unaccompanied by Sgt.

Lane, talked to the coroner on her own and the coroner himself made the determination to pick up Mr. Smith based on Mrs. Smith's information. Certainly Sgt. Lane cannot be responsible for that. It must be rem ember at the time that petitioner complains of all of this malice that Sgt. Lane, on the date of the altercation, did not arrest Mr. Smith, gave him back his gun and simply refused to accept a charge on that day that Mr. Smith desired to file against the McDowells. Petitioner has never stated or given any reason as to why the Deputy would have gone through all of these machinations to arrest someone for incest that he never knew before. The fact that Sgt. Lane was acting as a good policeman in doing his job apparently has not crossed petitioner's mind. Petitioner has never come up with a reason that Sgt. Lane's action should be considered as malicious. No motive ever was shown, and indeed petitioner's allegations i.e. that Sgt.Lane accompanied Mrs. Smith to the coroner's office and assisted the coroner were found to be totally without merit.

Petitioner further alleges that Deputy Lane withheld relevant information. The statements with reference to the withholding of relevant information from Mr. Ponder, the Assistant District Attorney, are complained of by petitioner and itemized as follows:

> 1. That he (Sgt. Lane) had threatened Shirley with arrest for incest.

This statement was denied by Sgt. Lane and was not corroborated by Shirley Smith. Mr. Ponder, in response to petitioner's question concerning whether or not Sgt.

Lane had told the girl about being prosecuted for incest responded:

"... that it would have made a difference to him"

and went on to state in his answer:

"... if I was convinced she was still telling the truth I am sure I would have (found probable cause)" Trial record, page 305 and 306.

The next complaint:

2. That petitioner had given permission to Shirley to marry Steve and had undertaken preparations for the impending wedding.

The response of Mr. Ponder to this was:

"Q. Did you find out at that meeting (the initial meeting with Miss Shirley Smith) that Mr. Smith gave Shirley and Steve permission to get married prior to that time? Were you aware of that at that time?

A. I don't know, I don't recall at that meeting. I do remember finding that out.

Q. Subsequently?

A. Yes.

Q. But at that meeting you weren't aware of it?
A. I don't know, I could have been."

And for the next:

3. That Steve and Shirley had smoked marijuana on occasion and petitioner prohibited his children from using drugs.

The testimony of Mr. Ponder reveals on that point:

"Q. Did you know that Mr. Smith objected to the marriage because Steve was smoking marijuana? Did you know that at the time?

A. I don't know if I knew it at the time, I knew that was the reason he had given sometime thereafter...

Q. Did you have any reason to believe at that meeting that Shirley may have had a motive for lying to you about the incest charge?

A. As I said, I took that into consideration before taking her statement. I did consider that, yes, sir."

The final delineation:

4. That respondent had interogated Shirley based soley on a hunch and that there exists a no probable cause when respondent undertook his investigation.

We cannot respond to that particular charge except to state that there was not discussion had with District Attorney Ponder about a hunch or a non-hunch. Deputy Lane indicated that he interrogated Shirley along those lines based on his observation of James Martin Smith's conduct, the statement by Mrs. McDowell of Shirley and Martin's relationship and Shirley's appearance when she came to see him. There is no testimony in the record reflecting what questions were asked by Mr. Ponder of Sgt. Lane, however, we submit that a policeman's hunch which uncovers a crime is as valid as him turning a corner and seeing a crime being committed.

There was no misleading by Sgt. Lane. This a crime involving a victim who was a minor. There were no witnesses. No testimony has been established which would show that Sgt. Lane withheld any information and plaintiff attempts to suggest by innuendo that since Sgt. Lane did not tell District Attorney Ponder of everything that he was concealing. Not so. The District Attorney's office through Mr. Ponder, indicated that they interviewed Shirley Smith and that she gave her

statement without prompting or assistance on any part, and that the charge was taken because of their belief in her veracity. Sgt. Lane could have simply relayed the information to Mr. Ponder and obtained the warrant based on Lane's statement alone of probable cause. However, he brought the young lady to the courthouse where she as interviewed by Mr. Ponder who then issued the charged. Lane did not even need a warrant but could have arrested Mr. Smith based on his own discretion. He did not do so. He followed the proper procedure and even went one step beyond in bringing the complaining witness down to be interviewed by the District Attorney who then decided to issue the warrant. Mr. Ponder could have refused the charge, he did not because he questioned Shirley, had her examined by the coroner and *believed her*. Mr. Ponder could have ended the entire matter by refusing to issue the warrant. He testified that the warrant was issued not at Sgt. Lane's request but based on Ponder's evaluation of Shirley and his belief that she was telling the truth.

Judge Parker (the Duty Judge at the time) reviewed the warrant and caused Lane to then arrest Smith for incest.

These intermediaries' decisions that probable cause existed broke the causal chain and insulate Sgt. Lane from liability for false arrest or malicious prosecution. *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977). Further, even if Sgt. Lane had acted maliciously, which was never proved, he could not be held liable since his involvement in the issuing the arrest warrant was limited to investigatory work. *Rodriguez v. Ritch-*

ey, id. at 1193. Because Shirley Smith, the complainant, personally appeared before Mr. Ponder and voluntarily answered his questions, he had a first-hand encounter with the victim. It *was* because of what Shirley told Mr. Ponder that he drew up an affidavit and presented it for Judge Parker's independent consideration. Sgt. Lane's motives or belief became irrelevant because he brought the complainant before an independent intermediary, Mr. Ponder. The intermediaries, who became involved after Sgt. Lane's preliminary investigation, secured an arrest warrant for Mr. Smith. They were acting entirely within their functions and acted with "due process of law". See *Baker v. McCollan*, 995 S. Ct. 2689, 2695 (1979). Mr. Smith was arrested under authority of a properly issued arrest warrant obtained by an Assistant District Attorney completely separate and independent of Sgt. Lane. The arrest warrant was not a "false" arrest or just a "facially" valid arrest, it was a valid and true arrest based on probable cause. The Fourth and Fourteenth Amendments do not protect against all deprivations of liberty. The Amendments protect only against deprivations of liberty accomplished without probable cause or due process, *Baker v. McCollan*, 995 S. Ct. 2689 (1979). Given the requirement that the arrest be made on finding probable cause and given the fact that Mr. Smith's arrest was made after two intermediaries independently determined probable cause, Sgt. Lane's feelings were immaterial. See *Hunter v. Clardy*, 558 F.2d 290, 292 (5th Cir. 1977). Sgt. Lane simply fulfilled the duties of his office in arresting Mr. Smith. Once a valid arrest warrant is

issued, it becomes the officer's duty to arrest the suspect regardless of any personal feelings toward the suspect. *Perry v. Jones*, 506 F.2d 778, 780 (5th Cir. 1974).

The second question by petitioner concerns whether the admission into evidence of Shirley's polygraph test (made at petitioner's request) results prejudicially impeached the credibility of the adverse party in violation of his due rights to due process and trial by jury, and contravened the Federal Rules of Evidence.

Petitioner alleged that Sgt. Lane violated his Constitutional rights because there was no probable cause to arrest petitioner. Sgt. Lane testified that he believed there was probable cause based on his belief in the truth of Shirley's allegations of incest.

The limited use of the polygraph test results does not constitute reversible error. The relevant portions of the trial proceedings concerning the polygraph test results are found at Vol. II, pages 287 and 290. The Judge carefully explained over and over to the jury that the results were only introduced to show if it was reasonable that respondent believed Shirley's allegations that incest had occurred. The jury knew that petitioner had been acquitted of the incest charges. This knowledge coupled with the Judge's explicit admonitions could not prejudice the jury or constitute reversible error. The Judge carefully instructed the jury that they could not use the test results to support, contradict or impeach a witness. The following is one of the Judge's careful explanations taken from Vol. II, page 478, lines 7 to 21:

> "The lie detector test is not being admitted to establish the truth of the matters asserted in the lie-

detector results. However, the Court has allowed you to consider this evidence so that you can make a determination as to whether or not the plaintiff's constitutional rights were or were not violated by the defendant; and that is the sole limited use that you may make of these particular two pieces of evidence.

You may not use that to support or to contradict or to impeach a witness; only to determine what information . . . the defendant had possession of . . . at the time that he took certain actions so that you may make a determination as to whether or not his actions were malicious, in bad faith, or whether or not they were good faith, and whether or not the plaintiff's constitutional rights were, in fact, violated in this case."

Petitioner alleged in his second amended complaint, paragraph 13 (f) that respondent's malicious acts took place throughout the prosecution of petitioner and, as such, all pertinent information used during the prosecution is relevant. As the trial Judge made abundantly clear, the results were introduced to aid in determining if respondent acted without malice and with probable cause in the arrest and prosecution of Mr. Smith. Vol II. pages 288 to 477. The admission of the test results into evidence for such a limited purpose was relevant and necessary to aid in determining if Sgt. Lane could have believed Shirley. Because it was the actions and intents of Sgt. Lane which were at issue, it is submitted that the test results were used as testimony of an expert witness in the believability of a complainant.

As in *Walther v. O'Connell*, 339 N.Y.S. 2d 389 (1972), the use of polygraph test results as testimony of

an expert witness was admissable when used to determine if a party was lying about an issue central to the case. The central issue concerning the admission of the test results was if Sgt. Lane believed Shirley. Respondent urges that the use of test results as expert testimony is limited to the believability of Shirley's allegations. If she could pass the polygraph test, it is reasonable that she could convince Sgt. Lane that she was telling the truth. The truth of what Shirley said is not the issue, the probability that Sgt. Lane believed her is. As in *Walther v. O'Connell*, id. the Court was not bound to the results of the test anymore than to the testimony of an expert witness and it was weighed *with all other testimony*.

In *People v. Lara*, 528 P.2d 365 (Cal. 1974), the court held:

> "Defendant's second complaint is that an investigation officer testified that the material witness on probable cause had submitted to a lie detector test and this event substantiated his belief that the witnesses' story was credible. But whatever may be the rule on the *results* of a polygraph test as evidence of *guilt* — a question we do not reconsider today — we are cited no authority holding such collateral use of the test for investigative purposes to be improper."

Respondent urges that the use of the test results as it related to the credibility of Shirley's story and Sgt. Lane's belief of it is not improper. Respondent further urges that the admissability of the test results is within the discretion of the trial judge to decide whether or not to receive such evidence for such a limited purpose. See *United States v. Lanza*, 356 F. Supp. 27 (1973) and

United States v. Kampiles, 609 F.2d 1233 at 1244 (1979).

It is submitted that the admission of the polygraph test made by petitioner's request was not prejudicial, particularly when viewed in light of all the evidence before the jury. The admission of the polygraph results which was carefully prefaced by the Judge took less than ten minutes out of a two day trial. Petitioner had already shown that he had been acquitted of the charge. The test before the jury was the validity of the arrest and subsequent trial. The jury was also apprised of the fact that two preliminary hearings had been had which found probable cause and the Grand Jury found probable cause.

Certainly the jury would not have considered the polygraph as a controlling factor with the above evidence plus the testimony of Assistant District Attorney. Mike Ponder, Dr. Hypolite Landry, and Coroner and Sgt. Lane that they did believe Shirley Smith.

CONCLUSION

For the foregoing reasons and based on the records of all prior proceedings, the Judgement of the Fifth Circuit should be affirmed. Petitioner never proved malice on the part of Deputy Lane or that respondent mislead anyone or withheld any information from anyone. Further, the admission of the polygraph test results was necessary and relevant to prove Deputy Lane's reasonable belief as to the truth of Shirley's allegations and his lack of malice.

Respectfuly submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Opposition to Writ of Certiorari were mailed, postage prepaid, to Andrew J. Ruzicho, 398 Grant, Suite 211, Columbus, Ohio 43215 this 4th day of October, 1982. I further certify that all parties required to be served have been served.

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